

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LARRY RUSSELL MARSHALL,

Petitioner,

Case No. 1:07-cv-959

v

HON. JANET T. NEFF

THOMAS K. BELL,

Respondent.

ORDER

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation on October 2, 2007, recommending that this Court dismiss the petition without prejudice for petitioner's failure to demonstrate the requisite exhaustion of state-court remedies of his fourth habeas ground. The Magistrate Judge observed that petitioner, at that time, could still file a new petition before the expiration of the limitations period. The matter is presently before the Court on petitioner's objections to the Report and Recommendation. Petitioner has also since filed a Motion to Stay Proceedings.

In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. Petitioner argues that the Magistrate Judge overlooked a motion to remand that he filed in the Michigan Supreme Court. A review of the state court docket entries indicates that petitioner did, in fact, file a motion to remand in the Supreme Court, which the

Supreme Court denied. However, the Magistrate Judge correctly held that a motion to remand does not exhaust state-court remedies. See, e.g., *People v. Albers*, 672 N.W.2d 336, 340 (Mich. Ct. App. 2003) (an issue outside the scope of questions presented in an appellant's brief on appeal is not fairly presented for appellate review), lv. den. 679 N.W.2d 58 (Mich. 2004). The Court therefore denies petitioner's objections.

Nonetheless, because petitioner can no longer file a new petition within the limitations period, the Court exercises its discretion to grant petitioner's request to stay this action pending the pursuit of his unexhausted claim in the Michigan state courts, specifically, a motion for relief from judgment under MICH. CT. R. 6.500 *et seq.* Petitioner's unexhausted claim is not plainly meritless, nor is there any indication that petitioner engaged in intentionally dilatory litigation tactics. See *Rhines v. Weber*, 544 U.S. 269, 278 (2005).

THEREFORE, IT IS ORDERED that the objections (Dkt 6) are DENIED and the Report and Recommendation of the Magistrate Judge (Dkt 5) is APPROVED and ADOPTED as the opinion of the Court to the extent noted.

IT IS FURTHER ORDERED that the motion to stay proceedings (Dkt 9) is GRANTED pending petitioner's pursuit of his unexhausted claim in the Michigan state courts.

IT IS FURTHER ORDERED that petitioner shall file a Motion for Relief from Judgment in the Michigan Court of Appeals within 30 days of this Order.

IT IS FURTHER ORDERED that petitioner shall file an amended petition setting forth his newly exhausted claims no later than 30 days after a final decision by the Michigan Supreme Court on his unexhausted claim and shall include a description of the newly exhausted claim and the date and substance of the decision at each step of the state court review.

IT IS FURTHER ORDERED that if petitioner fails to comply with the deadlines imposed in this Order, then the Court may dismiss the petition.

IT IS FURTHER ORDERED that this case shall be administratively closed until such time as petitioner files a motion to amend his petition in accordance with the procedures set forth in this Order.

Date: July 28, 2008

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge